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BRIEF FOR PLAINTIFF IN ERROR.

Filed Jan. 19, 1899.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 164.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

A. G. SAFFORD,
C. O. BAILEY,
of Counsel.
JOE KIRBY, Pro. Per.

IN THE

SUPREME COURT OF THE UNITED STATES

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff was indicted by the grand jury of the District Court of the United States for the Southern Division of the District of South Dakota, at the term of said Court, held at the city of Sioux Falls on the third Tuesday of October, 1896, for an alleged violation of the second section of the act of Congress of March 3, 1875, (18 Stat. at L., 470,) entitled, "An Act to Punish Certain Larcenies, and the Receivers of Stolen Goods." (3.)

The indictment contained, as conducted by the prosecution, three counts, and by the plaintiff in error, six. The case has proceeded upon the theory that the plaintiff in error was charged therein with feloniously receiving and having in his possession, with intent to convert the same to his own use and gain, certain postage stamps which had been, as was said, before that time stolen from the post offices at Highmore, Miller and Waubay, all in the State of South Dakota; the first count, as claimed by the prosecution, was based upon stamps said to have been stolen from the post office at Miller, and the third on those said to have been stolen from Waubay. The plaintiff interposed a demurrer to the indictment; the demurrer was overruled. (7.)

The plaintiff in error, having plead not guilty, was put upon trial at the April Term, 1897, and the cause was fully heard and submitted to the jury upon the Highmore count of the indictment only, the presiding judge having ordered a verdict of not guilty on April 19th as to the Miller and Waubay counts. It appears that at that trial after the case had been submitted to the jury, and while the defendant was at large upon bail, and while both himself and his counsel were absent from the court room, the jury returned and informed the presiding judge that they were unable to agree upon a verdict, and the presiding judge, without notifying either the plaintiff in error or his counsel, and in their absence, as aforesaid, received the report of the jury, and discharged them from further consideration of the case, without the knowledge or consent of the plaintiff in error or his counsel.

At a term of the Court, and in June, 1897, (claimed by the prosecution to be an adjournment of the April term,) the plaintiff in error was again put upon trial upon the alleged first count in said indictment; for this trial the presiding judge summoned a new and special jury. (15.) The plaintiff in error interposed a challenge to the whole array of jurors, claiming it was not an impartial jury of the state and district, according to Article 6 of the Amendments to the Constitution of the United States. It appears that the presiding judge ordered the clerk and jury commissioner to draw the special jury to try the plaintiff in error, from the box from names selected from the body of the Southern Division of the District of South Dakota, *exclusive of the corporate limits of the city of Sioux Falls*, where defendant is accused of having committed the crime. The reason given for this extraordinary order was "that the records of the court show that said plaintiff in error has once been tried for the offence charged in the indictment, and said trial resulted in a disagreement of the jury:" The challenge to the array of jurors was denied.

The plaintiff in error then interposed a plea in abatement and praying that this action be dismissed, (16) claiming substantially that the trial which had taken place before that time, when the presiding judge had received the report of the jury that they were unable to agree, and had discharged them from further consideration of the case, in the absence of and without the knowledge or consent of the plaintiff in error or his counsel, operated to place the plaintiff in error once in jeopardy for the offence claimed to have been committed by him with reference to the postage stamps said to have been stolen from the post office at Highmore, and claiming that the second trial was in effect placing him twice in jeopardy contrary to the provision of Article V of the Amendments to the Constitution of the United States. No issue to this plea was taken by the prosecution, but the presiding judge summarily held that the provision of the Constitution above referred to did not apply to the situation, and that the former trial did not place the plaintiff in error once in

jeopardy, it not being necessary, as he ruled, that the plaintiff in error or his counsel should have been present when the former jury was discharged, and for that reason, overruled the motion.

Thereupon the trial proceeded. Mr. O. S. Pendar, the clerk of the Court, was sworn as a witness on behalf of the prosecution, (20) and before any evidence was introduced, the plaintiff in error objected to the introduction of any testimony under the said first count of the indictment, it being upon that count of the indictment only that the plaintiff in error was put upon trial, for the following reasons:

1. That the count upon which the plaintiff in error was placed on trial did not state facts sufficient to constitute a crime committed by the defendant of which the Court had jurisdiction, or otherwise.

2. That said count did not inform the defendant of the nature and cause of the accusation against him, as required by Article VI of the Amendments of the Constitution of the United States and that to require the plaintiff in error to proceed to trial upon said count would be to deprive him of his liberty or property without due process of law, as provided by Article V of the Amendments to the Constitution of the United States.

3. That said count was defective and did not charge the plaintiff in error with having committed any public offense or crime against the law of the land of which the Court had jurisdiction, or otherwise, which objections were overruled by the Court.

And thereupon, and before the introduction of any testimony, the plaintiff in error further objected to the introduction of any testimony under said indictment, for the reasons, (a) that it does not state sufficient facts to constitute a crime; (b) that it does not inform the plaintiff in error of the nature of the accusation against him, and to require him to proceed with the trial would be to deprive him of his liberty or property without due process of law; (c) that it was defective and did not charge the plaintiff in error with having committed any public offense; (d) that section 2 of the Act of March 3, 1875, is unconstitutional and not according to due process of law or the laws of the land, "and especially in so far as the same attempts to make the judgment of conviction of the principal felon, conclusive evidence in the prosecution against the receiver of the property, that the property therein described has been embezzled, stolen, or purloined;" (e) that said count was defective and did not purport to accuse the plaintiff in error of the commission of any crime, and referred to things set forth in other counts for substantial matters; (f) that the indictment is defective in that it does not state from whom said stamps were received, nor that said stamps or other property was the property of the United States at the time the plaintiff in error was charged with receiving of the same, nor does it charge that they were of any value. All of said objections were overruled.

The witness, Pendar, thereupon testified that he was clerk of the District Court for South Dakota, and had charge of the records and of the records of September Term, 1896, held at Deadwood, and produced the records and files which he testified were the original records and files of the court, and thereupon the prosecution offered in evidence page 23 of the Journal of the Court, referred to and produced by the witness Pendar; said records and files so produced and offered were the records of the indictment in the case of the United States against Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll and Frank King, said defendants being the persons who it was claimed were the principal felons who participated in the robbery of the Highmore, Waubay and Miller post offices. The plaintiff in error objected to the production of the record (22), for the reason that no proper foundation had been laid for the proof of the indictment by the record copy, the indictment itself not having been offered in evidence, and there being no explanation in regard to its non-production. This objection was overruled by the Court. The prosecution then offered the indictment in evidence, (22, 23). To the offer of this indictment in evidence the plaintiff in error interposed his objections, generally that it was incompetent, irrelevant and immaterial and did not conform to the allegations contained in the indictment upon which the plaintiff in error was then on trial, and for the particular reason that the act of Congress, approved March 3, 1875, under which it was sought to introduce this exhibit, was unconstitutional, because the plaintiff in error was entitled upon this trial to be confronted with the witnesses called against him, as provided in Article V of the Constitution of the United States, and that the second paragraph of the second section of the Act of March 3, 1875, which provides as follows:

"And such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be *conclusive evidence* in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen or purloined," is violative of that constitutional provision. The presiding judge held that the paragraph of said act above quoted was not violative of said provision of the Constitution, and admitted the testimony.

The witness Pendar, thereupon proceeded (24, 25, 26, 27, 28, 29) to introduce against the objections of the plaintiff in error, based upon the constitutional provision, and for the other reasons last above stated, the records of the court showing, as was said, the presentment, arraignment and conviction of the principal felons for the robbery of the said post offices—two on the plea of guilty, and one on the verdict of a jury.

The witness, Pendar, had no personal knowledge whatever in regard to said robbery, and was only the medium through which the conviction of said principal felons was proven, as provided in the

second paragraph of the second section of the law of March, 1875, and this was the only evidence in the case that there had been a robbery of the post office at Highmore; that postage stamps of the United States had been stolen therefrom by any one, or that the stamps so said to have been stolen were the property of the United States on the 7th day of June, 1896.

Other witnesses were thereupon called and sworn as follows: V. M. Lister, M. Haverly, W. C. French, William Twomey, M. L. English and Ben. P. Hoover. None of these witnesses knew anything in regard to the robbery of the post office at Highmore, nor do they appear to have known the plaintiff in error, or anything whatever in regard to his alleged receipt of the fruits of that robbery; they testified to seeing the principal felons, some of whom they recognized, and some they did not, at different points along the route between Highmore and Gettysburg, South Dakota, from which point, it was claimed, that one of the felons sent an express package containing the stamps to the plaintiff in error at Sioux Falls, by express. Numerous objections were taken during the introduction of the testimony of these witnesses to the testimony given by them, which objections were overruled.

J. H. Howe, the agent of the express company at Gettysburg, L. S. Tyler, the agent of the express company at Sioux Falls, W. G. Nicoli, the delivery clerk for the express company at Sioux Falls, were called and testified to the transporation of the package from Gettysburg to Sioux Falls, and its delivery. These witnesses, like the others, had no knowledge whatever of the robbery at Highmore, and were none of them able to identify the man who left the package at Gettysburg as being one of the convicted felons, although they did identify some of them. None of these witnesses knew anything in regard to the plaintiff in error, excepting that his name appeared upon the records of the express company as being the consignee of the package, and it was not shown that any one had personal knowledge that the plaintiff in error received the package, nor was it shown that the express receipt bearing his name was in fact signed by him. Numerous objections were taken to the testimony of these last witnesses, which were overruled by the Court.

M. C. Fosness was called and sworn on behalf of the prosecution. He was the Post Office Inspector who had charge on the part of the government of the cases against the principal felons and the plaintiff in error; he had no personal knowledge of the robbery at Highmore, excepting only the hearsay statements which had been made to him while he was at work upon the case; He was permitted (70) to testify to the fact that the post office at Highmore had been robbed on June 7, 1896; the plaintiff in error seasonably objected to this testimony, but the Court permitted him to testify to that fact, although it appeared that his only knowledge in regard to the fact was a telegram received by him at Aberdeen, the morning after the alleged robbery, and such facts as he subsequently ascertained

from persons who were not called as witnesses. The principal part of the testimony of this witness was directed to conversations he had with the plaintiff in error, and it is solely to the evidence of this witness that the question of guilty knowledge and criminal intent on the part of the plaintiff in error must be directed. Against the seasonable objection of the plaintiff in error, this witness was permitted to testify in regard to the robberies at Miller and Waubay, of which charges the plaintiff in error had been acquitted on the preceding trial. Numerous other objections were made to the testimony of this witness, which were overruled by the Court.

S. B. Van Buskirk, the Assistant District Attorney for that district, was also called as a witness; but his evidence was in every respect favorable to the plaintiff in error.

No other witnesses were examined or evidence introduced.

The plaintiff in error (89) made several motions in regard to striking out impertinent and improper testimony, which motions were overruled by the Court, and moved the Court to instruct the jury to acquit the plaintiff in error, because of the insufficiency of the indictment and because there was no sufficient evidence to warrant the jury in returning a verdict of guilty (90).

The plaintiff in error requested the Court to give certain instructions (90), which were refused. Thereupon the Court charged the jury (91, 92, 93, 94, 95, 96 and 97), which was excepted to by the plaintiff in error.

The jury (no copy of the indictment being furnished them) retired to consider their verdict, and returned and informed the Court that they had agreed upon a verdict as follows, which was entered on the minutes of the Court:

"We, the jury in the case of the United States vs. Joseph Kirby, defendant, find the defendant, Joseph Kirby, guilty of having in his possession stolen property belonging to the United States, as claimed in the indictment, knowing them to be so."

This verdict omitted from its finding the fact that the plaintiff in error had the stolen property in his possession with intent to convert the same to his own use, and thereupon the Court (96) said to the jury:

"Gentlemen of the jury, in regard to the form of the verdict, of course, if the jury decides to find a special verdict, all the members of the jury will have to unite upon the findings of fact, and it would have to be technically correctly drawn up. Do I understand from the foreman that the jury finds the defendant guilty of having in his possession stolen property as charged in the first count of the indictment?"

To which the foreman of the jury replied. "That is our decision, your Honor."

Thereupon the Court directed the verdict to be entered in the following form:

"We, the jury in the case of the United States vs. Joseph Kirby, find the defendant, Joseph Kirby, guilty of having in his possession property of the United States, knowing it to have been stolen, as charged in the first count of the indictment."

The plaintiff in error objected to the form of the verdict as given by the Court and insisted upon the record of the verdict as given by the jury. Thereupon (98) the Court said:

"Gentlemen of the jury, the verdict that you have returned does not state facts sufficient to formally express what you have expressed to the Court that you find. You have either a right to find him guilty or not guilty as charged in the first count of the indictment; or, if you see fit, you may find the facts."

To this the foreman of the jury responded:

"Your Honor, we, the jury, find this case just as I have stated it, and I was instructed by the jurymen to give it in that way."

After this conversation the jury was polled, eleven replying in the affirmative and one in the negative; the jury then retired and afterward returned a general verdict that the plaintiff in error was "guilty of the charges as contained in the first count of the indictment."

ASSIGNMENT OF ERRORS.

The plaintiff in error assigned twenty-three errors (100–107). They were substantially as follows:

(a.) That he was convicted upon an insufficient indictment.

(b.) That he had once been placed in jeopardy for the same offense.

(c.) That the jury was not a constitutional jury.

(d.) That the charge was based on an unconstitutional statute.

(e.) That the essential ingredients of the offense were not attempted to be proven by the witnesses whom it was claimed had knowledge of those facts, but by the record of the trial of the principal felons, as shown by the court records.

(f.) That the statute of March 3, 1875, authorizing proof of a conclusive character as to the character of the goods, is unconstitutional.

(g.) That the witnesses called at the time of the trial were permitted to give improper testimony, as is fully set forth in the record, and especially that the Court erred (70) in allowing the witness Fosness to testify that he knew of the fact of the postoffice robbery at Highmore, such knowledge being acquired exclusively by hearsay; and, further (74), in allowing the same witness to testify in substance that he had a conversation with the plaintiff in error in which he accused him of receiving packages from the thieves from Aberdeen just after the robberies at Miller and Waubay, and that the plaintiff in error seemed greatly surprised at such accusations.

(h.) In admitting in evidence plaintiff's exhibit "O" (64), be-

ing a purported receipt of a package consigned by the American Express company from Gettysburg, S. D., to the plaintiff in error, and especially permitting, without identification, the same, containing a purported receipt by Joe Kirby, to be presented to the jury.

(i.) The Court further erred in admitting in evidence and refusing to strike out the testimony of William Nicoli (68), which was in substance that he believed that on the 9th day of June, 1896, he delivered a package, shipped from Gettysburg, at Mr. Kirby's office, but that he had no personal knowledge thereof.

(j.) Because the Court refused to instruct the jury, as requested by the plaintiff in error, as follows (91): "Recent unexplained possession by the defendant of stolen property may be evidence from which the jury would be justified in finding the defendant had committed the crime of larceny; but in order to justify a verdict other than not guilty upon the charge in the indictment upon which the defendant is now on trial it is necessary for the prosecution to show that the defendant had knowledge that the property had been stolen. The burden is on the prosecution to show such knowledge, and not on the defendant to show want of it."

(k.) Because the Court refused to give the following instruction (91), as requested by the plaintiff in error: "In order to establish the crime charged in the indictment upon which this defendant is now on trial it is necessary for the prosecution, not only to satisfy you beyond a reasonable doubt that the property which the defendant is charged with receiving was then stolen property, but it is likewise necessary for it to prove that the defendant had knowledge at the time he received such property that the same was stolen, and with such guilty knowledge from the thief and as the testimony of Mr. Howe, the express agent at Gettysburg, who claims one E. Baxter (60) sent the package which the government claims contained the stolen property, and as no attempt has been made by the prosecution to connect the said E. Baxter in any manner with the alleged thief, nor to identify him as being the Ed Baxter, the record of whose conviction is set forth, and as the testimony of Mr. French (41) likewise tends to show that a party named Baxter, other than the Baxter the record of whose conviction is before you, was at Gettysburg at the same time; and as the testimony of Mr. Fosness as to Mr. Kirby's statement in response to his, or Mr. Miller's, inquiry as to what the package contained, merely stated that it contained property that Mr. Fosness was seeking for; and such statement, while it might tend to show Mr. Kirby's opinion then that he had the stamps stolen from Highmore, still it could not be taken as an admission that he had received such property from the thief, nor that at the time that he had received it that he had any guilty knowledge of the theft of such property, and therefore you are instructed to return a verdict of not guilty."

(l.) Because the Court improperly charged the jury (93), "that

the record of the conviction of the thieves established a *prima facie* case on the part of the government."

(m.) Because the Court refused to charge the jury in accordance with the first request of the plaintiff in error (90), to the effect that as no issue had been raised by the prosecution with the plea of former jeopardy (16–17), it was their duty thereunder to return a verdict in his favor.

(n.) Because the Court refused to receive the verdict offered by the jury.

(o.) Because the Court improperly interfered with the functions of the jury in the matter of rendering their verdict.

(p.) Because the Court refused to consider the affidavits of the jurors as to their verdict.

(q.) Because the Court overruled the motion in arrest of judgment.

(r.) Because the trial court did not have jurisdiction of the plaintiff in error or the subject matter of indictment.

BRIEF AND ARGUMENT.

I.

There can be no question as to the jurisdiction of this Court to review upon writ of error the questions presented in this case.

Section 5 of the act of March 3, 1891, as amended by the act of January 20, 1897, establishing Circuit Courts of Appeal and regulating appeals to that court and to the Supreme Court of the United States, provides that appeals or writs of error may be taken from the District Courts directly to the Supreme Court in the following cases:

"In any case that involves the construction or the application of the Constitution of the United States."

"In any case in which the constitutionality of any law of the United States * * * is drawn in question."

The construction and application of the V and VI articles of amendment to the Constitution were involved in the trial of this case. At every step in the progress of the trial the plaintiff in error interposed objections that his rights and privileges guaranteed by those sections of the Constitution were being invaded and trampled upon.

The law of March 3, 1875, which permits conviction on certificate and attempts to do away with the constitutional provision that the accused "shall be confronted with the witnesses against him" was involved, and the application of that statute by the Court in dispensing with the evidence of witnesses to show the property claimed to have been stolen was stolen, and that it was the property of the United States, was specifically objected to.

Specific objection was also made to the statute, Section 800 *et seq*, R. S., providing for the drawings of juries under which the

presiding judge attempted to designate the district or parts of the district from which the jury in the case should be drawn; but the application of the law in regard to drawing juries to this case was objected to as being violative of the constitutional requirements as to the drawing of jurors, as provided for in the Constitution.

The constitutional objections and questions involved in the case are discussed hereafter.

II.

When a writ of error is taken directly to this Court under Section V of the act of March 3, 1891, in a case in which the constitutionality of a law of the United States is involved, this Court acquires jurisdiction of the whole case and of all the questions involved in it, and not merely the question of the constitutionality of the law.

Horner vs. U. S., 143 U. S., 570.

III.

The finding of a sufficient indictment by a grand jury is jurisdictional and a right of which accused cannot under the constitution be deprived.

Re Bain, 121 U. S., 1.

The first count in the indictment under which the plaintiff in error was convicted is fatally defective:

(a.) Every ingredient of which the crime is composed must be actually and clearly alleged.

U. S. vs. Cook, 17 Wall, 174.
U. S. vs. Cruikshank, 92 U. S., 542.
Regina vs. Martin, 9 C. & P., 215.

(b.) The ownership of the property of the United States is a jurisdictional question; the federal courts could have no jurisdiction of larcenies unless the government of the United States was in some way, interested; in the legislation of March 3, 1875, congress undertook to punish larcenies of United States property, and also the receivers of such property; therefore, the ownership of the property stolen is fundamental and jurisdictional, and such ownership *at the time the crime is charged to have been committed* must be distinctly alleged and proved.

Afferbach vs. McGovern, 21 Pac. Rep. (Cal.), 837.
Fredericks vs. Tracey, 33 Pac. Rep. (Cal.), 750.
Miller vs. People, 13 Colorado, 166.
State vs. Lyon, 17 Wis., 237 (245).
People vs. Vice, 21 Cal., 345.
Higgins vs. State, 19 S. W. Rep., 503.
State vs. Ellis, 24 S. W. Rep., 1017.
State vs. Lathrop, 15 Vt., 279.
Thomas vs. State, 22 S. E. Rep., 956.
Moultier vs. State, 20 So. Rep., 554.

(c.) It is not alleged in this indictment that the postage stamps said to have been stolen at Highmore were the property of the United States at the time the indictment charges the plaintiff in error with having received said stamps. The allegation is this substantially: that the principal felons, on the 7th day of June, 1896, broke into the postoffice at Highmore and then and there stole certain postage stamps, which the indictment alleges were then and there, "at the time of so being stolen", the property of United States; that is to say, that said stamps were the property of the United States on the 7th day of June, 1896. It is not alleged that the stamps were the property of the United States on the 9th day of June, when it is charged the plaintiff in error received them at the city of Sioux Falls; this defect cannot be aided by any intendment or presumption arising as to the continuance of ownership after it has once been established, as has been decided over and over again. Such an allegation is insufficient, even in a civil action. In *Fredericks vs. Tracey*, *supra*, which was an action in replevin, commenced on the 19th day of November, the complaint alleged that the plaintiff was the owner and entitled to the possession of the property in controversy on the 17th day of November. In answer to the contention of the plaintiff that such complaint was sufficient, upon the theory that ownership once shown to exist is presumed to continue, the Court says:

"It is a cardinal principle in pleading that ultimate probative "facts are to be pleaded. The ultimate fact in such an action is "that the plaintiff was at the time the action was commenced the "owner of and entitled to the possession of the property. The fact "that he was the owner and entitled to the possession at a previous "date is *evidence* from which the ultimate fact may be deduced "upon the principle that a thing once shown to exist continues as "long as is usual with things of that nature. * * * There is "nothing in the complaint to show that at the time the action was "commenced the plaintiff had any ownership or right of possession "in said property, and for this reason the judgment is reversed."

The very early case of *Sir Nicholas Pointz*, *Cro. Jac.*, *214*, has been followed without question by all English-speaking courts, as to material averments.

That was a complaint for forcible entry, which described the land as "being the freehold of J. B." And it was held that the indictment was fatally defective, because "it was not alleged *ad tunc existens*, for it may be that the land was the freehold of J. B. at the time of finding the indictment and not at the time of entry." If that indictment was bad because the ownership of the land was only alleged to be in J. B. at the time of finding the indictment, then this indictment must be bad which fails to allege that the title to this property was in the United States at the time it was received by the plaintiff in error.

Such ownership must be stated and proven as alleged.

2 Bish. New Cr. Pro., §991a, and cases cited.

(d.). The indictment is also defective, in that it fails to allege from whom the plaintiff in error received the stamps which had been stolen. The indictment alleges the stamps to have been stolen at a remote point from Sioux Falls by certain persons on the 7th day of June, 1896, and that the defendant received the same stamps at Sioux Falls on the 9th day of June, 1896, but it does not allege that the plaintiff in error received them from the persons who were said to have originally stolen them.

U. S. vs. De Bare, 6 Bis., 358.
State vs. Ives, 13 Iredell, 338.
Foster vs. State, 106, Ind., 272.
2 Bish. New Cr. L., Sec. 1140.

For the same reasons that in ordinary larcenies and offenses against property it is necessary to allege the ownership, it is equally necessary in an indictment for receiving stolen goods to name the person from whom the receiver is said to have received them; he is entitled to know the nature of the accusation against him and to have such definite information given him in the indictment as to enable him to make a proper preparation of his defense, and to prevent being twice prosecuted for the same offense.

In *U. S. De Barre, supra*, which was a prosecution on the charge of receiving stolen postage stamps under the statute now in question, the learned trial Court says:

"I regard the point as conclusively settled upon authority. In "*State vs. Ives* it was held that an indictment for receiving stolen "goods must aver from whom the goods were received, so as to show "that the person charged received them from the principal felon. "If he received them from any other the statute does not apply."

In *Foster vs. State, supra*, the Court says:

"To render the offense of receiving stolen goods possible the "goods must retain their stolen character at the time the party "charged received them. If, therefore, the goods have been trans- "ferred from the thief to a guilty receiver, the latter takes as a re- "ceiver and not as a thief. In his hands, and as to him, the goods "are not stolen. In his hands the character of the goods is derived "from his offense, and not from the offense of the person who stole "them, so that one who receives goods from him, however wickedly, "is not guilty of receiving stolen goods, either within the common "law or statutory definition of the offense."

In *2 Bish., New Cr. L., Sec. 1140*, we find the law laid down in almost the same words used above in the Foster case.

(e.) The indictment is also fatally defective for duplicity; it contains complete indictments against the principal felons, and what is claimed to be an indictment against the plaintiff in error.

Rev. Stat. U. S., 1024.
1 Chit. Cr. Law, 267.
1 Bish. New Cr. Law, 429.

State vs. Lyon, 17 Wis, 237 (245).
State vs. Langley, 10 Ind., 482.
Elliott vs. State, 26 Ala., 80.
State vs. Daubet, 42 Mo., 242.
State vs. Hall, 97 N. Car., 474.
State vs. Wainwright, 6 Ark., 280.

But further than this the indictment nowhere alleges the property which the accused is charged with having received to have had any value whatever at the time of such receipt. It alleges that on the *7th* day of June certain thieves stole moneys and postage stamps of a given value, and on the *9th* day the accused received the postage stamps "so as aforesaid feloniously stolen", but nowhere are such articles alleged, at this latter date, to have any value or even to be the property of the United States or anyone else. The statute in question expressly makes it "a valuable thing". In such a case value must be alleged.

In conclusion, as to the insufficiency of this indictment, let us say that an indictment is never sufficient if all of the charges therein set forth may be true and still by any means consistent with the innocence of the defendant.

State vs. Godfry, 24 Me., 233.

In *State vs. Godfry, supra*, the Court, we think aptly, says:

"It is a well established principle that if all the facts alleged in "the indictment may be true and yet constitute no offense, the in-"dictment is insufficient."

May not each and every fact set forth in the indictment be true and still the accused not guilty. For the purpose of this argument we may concede, without admitting, that the property mentioned was stolen from the United States on the 7th day of June by the alleged thieves; that the accused received this same property on the 9th day of June; that he knew it had been theretofore stolen, and that he intended to convert it to his own use, and still be innocent. Can he not answer: all these may be true, but still I did not receive it of the thief; it was not the property of the United States at the time I got it; it did not have the character of stolen property at the time I received it; I got this property from parties to whom the United States conveyed it. Or he could answer: the United States recaptured this property and either itself or its grantee conveyed it to me; I knew that it had at one time been stolen, and I bought it for my own use, but I also knew that it no longer retained the character of stolen property.

IV.

The jury specially summoned to try the plaintiff in error upon this indictment the second term of the court was illegally ordered and improperly drawn:

(a.) Article VI of the Amendments to the Constitution pro-

vides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law." This provision of the Constitution has been frequently before the courts and has received the most liberal construction; it has been held that although the number of jurors to compose the panel is not specified, yet the constitutional provision means a common law jury of twelve men.

(b.) A common-law jury not only meant a jury of twelve persons only, but it meant a jury drawn from the vicinage; and the framers of the amendments to the Constitution were careful to provide that the jury must be drawn from among the inhabitants of the district where the crime shall have been committed, and also to provide that the district shall have previously been ascertained by law. Previously to what? Plainly, previously to the commission of the crime.

(c.) We have not to deal in this case with the question as to whether the law of Congress directing the presiding judge in certain cases to draw jurors from parts of the district to the exclusion of other parts; it is not necessary to discuss that broad question, but simply to discuss whether, for the reason given by this presiding judge, he had a right to exclude the vicinage, containing over 2,000 persons competent for jury duty (15), from the district from which he ordered the jurors drawn. The only reason given in this case for making this extraordinary order was that the plaintiff in error had once been tried at the same term of court; not a sufficient reason, surely, for overriding this salutary provision of the Constitution. It may well be doubted whether Congress has the power to authorize the presiding judge of a federal court to draw special jurors from a new district created after the alleged commission of the crime.

(d.) The district referred to in the Constitution means a jury district ascertained previously to the commission of the crime, and not necessarily the entire district over which a district court presides; the latter district may include any number of the former, but in all cases the jury district from which the trial jury "*liberos et legales homines de vincineto*", are returned must include the vicinage of the crime. It must be born in mind that one of the potent factors which led to the revolutionary war, and expressly resented in the Declaration of Independence, was the attempt of the Crown to deprive the inhabitants of the colonies of this important right—the right of a trial before a jury of their neighbors. In view of these facts, we think it will scarcely be contended that Congress, as early as 1789 passed the act in controversy with any other view than that the court might further limit the jury to the immediate neighborhood of the alleged crime. This is clearly the meaning intended by Section 802, R. S. U. S. It was the intent of Congress in the passage of this law that it would be executed in conformity with the con-

stitutional provision, and not in violation of it. It is of doubtful constitutionality at the best; certainly unconstitutional in the application which was made of it in this case.

Zanone vs. State, 97 Tenn., 101.
Smart vs. Kimball, 43 Mich., 448.
Olive vs. State, 11 Neb., 1.
State vs. Bunker, 38 Kan., 737.
People vs. Powell, 25 Pac. Rep., 481.
People vs. Hall, 48 Mich., 482.
Shafer vs. State, 1 How. (Miss.), 243.
State vs. Nash, 46 La. Ann., 194.
4 Blackstone Com., 350.
Cooley Con. Lim., 391.
Black's Con. Law, 572.

In *Zanone vs. State, supra*, the trial judge ordered a jury to be selected upon the second trial from the district exclusive of the city in which the crime was charged to have been committed, giving as his reason that in his opinion a proper jury could be more readily obtained. This the Supreme Court of Tennessee held to be an unconstitutional interference with the right of the accused.

In *People vs. Hall, supra*, the trial judge ordered a jury returned from the proper county, but excluded the township where the crime was charged to have bean committed. The Supreme Court of Michigan reversed the case, for the reason that the defendant was entitled to be tried by a constitutional jury of the vicinage.

The whole reason is concisely stated by Judge Cooley in his excellent work on Constitutional Limitations, *supra:*

"The jury must also be summoned from the vicinage where the "crime is supposed to have been committed, and the accused will "thus have the benefit of his own good character and standing with his neighbors, if these he has preserved."

We think this is well stated of the rights of the accused in the case at bar. Here is an attorney of good standing accused of an infamous crime. If he is a dangerous citizen, his neighbors will know it; while, if he has retained their respect, he is entitled to have the benefit of their good opinion. In place of this, under the meaning given the statute by the learned trial judge, his good standing is of no consideration. He is placed on trial before a jury of strangers, called by the officers of the prosecution to attend at an adjourned term held expressly for the purpose of trying him.

V.

The motion of the plaintiff in error that the action be abated by reason of the former trial, wherein the presiding judge, in the absence of the plaintiff in error and his counsel, and without their knowledge and consent, after the whole case had been submitted to the jury, and they had returned into court and announced that they

were unable to agree and were thereupon discharged from further consideration of the case, ought to have been allowed:

(a.) That the plaintiff was charged with an infamous crime is not an open question.

Re Wilson, 114 U. S., 417.
Re Claasen, 140 U. S., 200.

(b.) That it is necessary for the defendant to be present at all stages of the trial upon an infamous charge, is the established rule in this court.

Lewis vs. U. S., 146 U. S., 370.
Hopt vs. Utah, 110 U. S., 574.

(c.) In case it becomes neoessary in the course of the trial to discharge the jury before they have arrived at a verdict, the accused must be personally present, and if he is not, the discharge will be wrongful, and he cannot be again placed on trial for the same offense.

State vs. Wilson, 50 Ind., 487.
State vs. Schuchart, 18 Neb., 454.
State vs. Alman, 64 N. C., 364.
State vs. Sommors, 61 N. W. Rep., 907.
Redder vs. State, 17 S. W. Rep., 717.
People vs. Gage, 48 Cal. 323.
Clark's Cr. Law, 373-4.
11 Am. & Eng. Ency. L., 955.

When the action was called for trial the second time, the above facts appearing from the record, it became the duty of the Court to refuse to proceed further with the case.

9 Ency. Pl. and Pr., 635.
State vs. Cross, 29 S. E. Rep., 527.
Foster vs. State, 8 S. W. Rep., 664.
State vs. Martin, 30 Wis., 222.

VI.

The act of March 3, 1875, is unconstitutional. It is violative of Art. VI of the Amendments to the Constitution, because it attempts to do away with the salutary provision, that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him.

The gist of the offense created by this statute, so far as the receiver of property claimed to have been stolen is concerned, is that the property has been stolen; that is the principal ingredient of the offense. This law proposes that the courts shall accept as conclusive the conviction of the principal felon that the property was stolen by him, and this whether the conviction is secured upon a plea of guilty or upon a verdict of a jury. Were it not that there arises a presumption against a person who has in his possession property that has been stolen this provision of the statute would not be so

harmful, although it would be still objectionable to the constitutional provision; but the law, as interpreted by the Court below, does raise a presumption against the possessor of stolen property (which the presiding judge rigorously applied in this case), and the accused is therefore vitally interested in having those witnesses whose testimony is relied upon to give that character to the property produced and sworn, so that he can have an opportunity to cross-examine them. In this case there was no evidence of actual knowledge on the part of the accused that the property had been stolen; that was proven (if it can be so said) by the record of conviction of the principal felons, and the presiding judge thereupon held, and so charged the jury that a presumption (sufficient to make a *prima facie* case against the accused) sprang into existence and placed the accused upon an explanation. Manifestly, the constitutional right of the plaintiff in error has been most cruelly violated; first, in dispensing with the presence at the trial of the witnesses who possibly might have shown the property to have been stolen, and then by raising a presumption of guilt from the possession of the property, only shown by a certificate of conviction of other parties, to be property of that character.

This right to be confronted by the witnesses against him, conferred by Article VI of the Amendments to the Constitution, and demanded by the accused at the trial, is now raised for the first time in this Court. Most of the other subjects of that and the preceding article have been considered and fully discussed, notably the other provision against self-incrimination. From the discussions of the other cases, the extreme jealousy of this Court in regard to legislation intended to impair, however slightly, the assured rights of accused persons is very apparent.

In *Counselman vs. Hitchcock*, *142 U. S.*, *547*, the question before the Court was whether the immunity provided in Section 860 of the Revised Statutes was coextensive with the constitutional provision that no person should be compelled to be a witness against himself in a criminal case. That section declared substantially that no evidence obtained from a witness under the provisions of that section should be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture.

The Court held that this law was violative of the constitutional rights of the witness, for the reason, among others, that "it could not and would not prevent the use of the testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which would be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when, otherwise, if he had refused to answer, he could not possibly have been convicted."

To meet the objections of the Court, Congress passed the act of February 11, 1893, which was before this Court for consideration in the case of *Brown vs. Walker, 161 U. S., 591.* This act, which gave immunity to the witness from all future prosecution as to any matter growing out of that which he might testify about, was only sustained by a bare majority of this Court, and distinctly upon the ground that by no possibility, under the new law, could the witness be placed in a worse condition by reason of his testimony. He could not, in regard to such matters, be an "accused person", and therefore this act was upheld; but the argument of the opinion of the majority of the Court is an unanswerable argument against the constitutionality of the law of March, 1875.

Counselman was a self-confessed criminal. With that the Court had nothing to do. It was considered better for the administration of justice under the Constitution that ninety and nine Counselmans should go unpunished rather than that the effective power of a constitutional safeguard should be impaired, even in theory. We say "in theory", for in the history of this country, although statutes similar in provision to Section 860 have been, from the very earliest times a part of the jurisprudence of the United States and of several of the states, there is no recorded case where it was ever attempted to use testimony of a witness thus secured against that witness in a subsequent prosecution. The law had never done harm, although it was of common application and generally accepted as constitutional; but because it contained an element that might be harmful it was expunged ftom the statute books.

How much more important to the person is the safeguard which insures to the accused the right to be confronted with the witnesses against him. The history of the world is crimsoned with the blood of the victims of star chamber courts, and today the Republic of France is convulsed and its very foundations shaken by reason of the conviction of one of its army officers upon a trial where the culprit was not "confronted with the witnesses against him."

Trials in the absence of the accused, where the testimony of witnesses he does not meet face-to-face is received, like extorted confessions, have ever been joined in the animadversions of writers concerning the inhuman courts by which cruel princes have sought to sustain their thrones.

The enormity of the statute in permitting the character of the goods to be proven as stolen, by witnesses not called into the presence of the accused and the trial court, is apparent when it is considered that adverse presumptions are raised by the silent provisions of the law, from the possession of goods which have been proven to be "stolen".

So that under this statute a complete case is permitted to be made out that one has stolen goods in his possession, and also that the possession is a criminal possession, without the evidence of a single witness which the accused can examine. This law stamps the

goods as stolen, and the rules of law, as charged by the Court, raise a presumption of guilt.

Upon the trial of this action the only evidence of any crime having been committed at the Highmore postoffice, outside of the testimony of Mr. Fosness, the postal inspector who was allowed to testify over objection that he knew of it being robbed (70) through a telegram he received from some undisclosed source, is the record of the conviction (21 to 30) of these three parties, two of whom were sentenced on the plea of guilty and one on the verdict, as we shall show later, of an unconstitutional jury. Can it be legally contended that the mere fact that a party has, in the absence of the accused, said that he himself is guilty, is to be received as evidence sufficient to justify the conviction of the accused? We think not.

Commonwealth vs. Elisha, 3 Gray (Mass.), 460.
State vs. Henkle, 54 Pac. Rep. (Or.), 155.
State vs. Newport, 4 Harr (Del.) 567.
State vs. Arnold, 48 Ia., 566.
State vs. Weztfall, 49 Ia., 328.
Jeremiah Hill's case, 1 City Hall Rec., 66.
People vs. Kroker, 72 Cal., 459.
Reg. vs. Robinson, 4 F. & F., 43.
Reg. vs. Pratt, 4 F. & F., 315.
1 Green. Evidence, Sec. 233, and cases cited.
Wharton Cr. Ev., Sec. 699 (8th Ed.), and cases cited.

This constitutional provision, guaranteeing to the accused the right to be confronted by the witnesses against him, is self-operating in its nature. No law of Congress was necessary to give it effect. It was of itself a limitation upon the power of the Court, and while Congress could throw further protections around the accused, in the absence of such legislation the Court was in this respect limited only by the Constitution. No act of Congress was necessary to enable the Court to reach this limit. The act of March 3, 1875, would, were it of any validity, be cumulative only. It would confer no new authority upon the Court, which was then only limited by the Constitution in determining what was competent as evidence. If the conviction of the thief was admissible in evidence under the Constitution prior to this act, it is yet; otherwise not.

In *Wharton on Evidence, supra*, we find the following:

"His confession therefore, subsequently made, even by a plea "of guilty, is not admissible as evidence against any but himself."

In *Commonwealth vs. Elisha, supra*, the Court says:

"Was the record of the conviction of the thief legal evidence "against the defendant upon the charge of receiving? We think "not, either on principle or authority. That conviction was *res in-*"*ter alios*. The defendant was not a party to the proceedings and had "no opportunity or right to be heard on the trial."

As will be seen from the cases above cited, a conviction could not be based on the uncorroborated testimony of the thief, properly

given. How then can more weight be given to his *ex parte* statement?

But there is another reason why the record of conviction of the alleged thieves cannot be received, which is well illustrated in this case. The principal felons are accused of stealing from the Highmore postoffice a large amount of stamps of different denominations, treasury notes, bank notes, gold and silver certificates, gold and silver coins, the theft of any one of which would sustain the charge in their indictment, while in the case now before the Court the plaintiff in error is accused in the indictment only of the receipt of certain stamps. The Court then has, under the contention of the prosecution conclusively presumed that the alleged thieves stole *all* the property mentioned in the indictment against them. In other words, it may have developed upon the trial of the principal felons that they stole one silver coin of the value of ten cents, and nothing more. Upon this the jury were obliged to return a verdict of guilty, and now, upon the trial of the accused, the Court has held that the postage stamps, because mentioned in the same indictment with the silver coin were likewise stolen. To do this is to overturn every principle of law which has been the outgrowth of ages, and to place it in the power of the prosecution to have the accused in the first instance presumed guilty, and transfer to him the burden of proving himself innocent under pain of conviction. For instance, suppose a jewelry store is burglarized and a silver spoon stolen. An indictment is returned against a suspected party, charging him with the theft of the spoon and also of a gold watch, which perhaps the dealer had missed, forgetting he had sold it a short time previously. Upon the trial the theft of the spoon is established and the thief convicted; and on this record, if the trial court is correct in its rulings, the party who had purchased the watch of the jeweler may be indicted and convicted on the charge of receiving a stolen watch—although no such watch was stolen; all because the grand jury inadvertantly described his watch as a part of the stolen property.

As we have said, the record of the conviction of one of the thieves before a jury shows such conviction on its face to be illegal and void. By the act of Congress approved November 3, 1893, the District of South Dakota is divided into four subdivisions, or trial districts. Highmore, where they are accused of having committed the trial alleged, is in Hyde county, in the Central division, with court therefor held in Pierre. Section 6 of this same act provides for the impaneling of a grand and a petit jury in each subdivision from the residents thereof. For some reason not apparent to us these parties were indicted and tried at Deadwood before a jury from the Western division. That such a proceeding was clearly in disregard of the constitutional right of such defendant and wholly void seems to us clear, for reasons given in another part of this brief.

In *Boyd vs. The Unitsd States, 116 U. S., 616, 635,* Mr. Justice Bradley said:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal mode of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half of their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizens against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

We claim that this constitutional provision shall only be construed with that liberality, which all of the decisions of this court insist they are entitled to. The law of March, 1875, is a stealthy encroachment upon the rights of the citizen, and is more than a "slight deviation" from legal modes of procedure. In prosecutions against the receiver of stolen goods, as above pointed out, the fact that the goods are stolen is one of the principal ingredients of the offense, and by all the cases, was necessary to be alleged and proven, or a conviction could not follow. The obvious intention of the act of 1875, was to dispense with the necessity of this proof, to make convictions, right or wrong, easier to be secured.

VII.

If the record of the conviction of the principal felons be laid out of the case, there is then no evidence that the property was "stolen property," and the verdict must be set aside. There was no other evidence in the case that the property was of that character.

And there is no evidence whatever that the property was the property of the United States; the prosecuting attorney seems to have proceeded upon the theory, a theory which was sustained by the Court, that the record of conviction not only proved the property to have been stolen but also that it was the property of the United States; the statute of the 3rd of March, 1875, does not provide that the record of conviction shall be conclusive proof of the ownership of the property, it only goes to the extent of being conclusive proof that the property has been stolen.

State vs. Careneas, 78 N. C., 484-491.
2 Bish. Cr. L. 1138.

VIII.

Besides admitting the record of conviction of the principal felons, the Court also permitted several improper questions to be asked and answered; notably those in relation to the identity of the persons who were seen in the vicinity of the alleged robberies con-

necting the plaintiff in error with either the felons or the express package; permitting the witness Fosness to swear to the fact of the robbery at Highmore (70), when his only knowledge was that received from a telegram the following day; permitting that witness to testify to other robberies than those mentioned in the first count of the indictment (74), and particularly as to those claimed robberies at Miller and Waubay, of which the plaintiff had been acquitted of having any complicity.

IX.

There is absolutely no evidence of any sort that the plaintiff in error had the stamps in his possession with intent to convert them to his own use and gain. For that reason if for no other the Court should have allowed the motion directing the jury to have returned a verdict of not guilty. Search this record from one end to the other, and there is not a scintilla of evidence, (except the presumption which the trial court held the law raises from the possession of stolen goods) that the plaintiff in errer knew that they had been stolen. It is to be remembered that the plaintiff in error is a practicing lawyer, in his professional capacity it was his duty to attend to the interests of his clients; it is not to his discredit that thieves and other criminals are among his clients; such criminals have rights which the courts and lawyers are bound to respect; such a lawyer might be in the possession of stolen goods without any adverse presumption being raised against him; after the Postoffice Inspector Fosness had received these stamps, of course no presumption would be raised against him, and yet in his receipt of them, he states that he takes them into his possession "believing them to have been stolen." The possession of stolen stamps by a regular practitioner in the court ought not to be considered as a presumption against him, unless long continued and coupled with some other incriminating circumstances.

Durant vs. People, 13 Mich., 351.
State vs. Bulla, 89 Mo., 595.
2 Bish. New Cr. Law, § 1138 to 1140.
State vs. Caveness, 78 N. C., 484-491.
20 Am. Eng. Ency. Law, 442.
Wilson vs. State, 12 Tex. App. 481.

Therefore, we see, that something more than the mere possession of stolen property is required in order to sustain a conviction; that possession, in the language of the indictment and the statutes must be with the intent to convert the property to his personal use and gain; and as to this branch of the case, there is no evidence whatever of there having been any such intention on the part of the plaintiff in error; his entire conduct with the postoffice inspector and the assistant district attorney was that of one having innocently in his possession property which those persons claimed had been

stolen. Not one of the stamps had been used by him; they were in the original package; he surrendered them just as soon as he had ascertained that there was a possibility that the claim made was true; he did all that the most scrupulous official could demand.

In *Durant vs. People supra.*, the Court says: "Possession itself "without evidence tending to show such guilty knowledge could "have no tendency to establish her guilt."

In *Wilson vs. State* the Court said: "Before the defendant can "be properly convicted it must be proven beyond a reasonable doubt "first that the property was acquired by theft, second that knowing "it to have been so acquired he concealed it."

In *State vs. Caveness, supra.*, the Court said: "To be guilty "the defendant must have known at the moment of receiving it that "it had been stolen and must at that time have received it with fel- "onious intent."

The plaintiff in error was entitled to have the judge charge in his first request (90) to the effect that as no issue had been taken by the prosecution upon the plea of former jeopardy (16-17) it was their duty thereunder to return a verdict in his favor upon such plea.

9 Ency. Pl. and Pr., title Former Acquittal 638 and cases cited.

For the reasons already shown in the authorities cited we think he should also have charged the jury as stated in the third request (91) of the plaintiff in error to the effect that recent unexplained possession by the defendant of stolen property was no evidence from which they could under the charge infer a guilty receiving on his part, and that the burden of showing such knowledge was on the prosecution.

For like reasons the Court should have given the fourth request (91) to the effect that there was no evidence that any of the alleged thieves sent the stolen property to the defendant, as there was no evidence to identify E. Baxter mentioned in the testimony of witness Howe (62) with the convict Ed. Baxter, and that the testimony of Mr. French (41) shows that another party by the name of Baxter was at Gettysburg at this time.

Andrews vs. Wynn, 4 S. Dak., 40.

In this case the Court said: "The Court can not take judicial "notice that Edward H. Andrews and E. H. Andrews are one and "the same person. We are of the opinion that it is not and we "could no more hold that E. H. meant Edward H. than we could "say Elmer H. meant Edward H."

XI.

The charge of the Court was misleading and erroneous, particularly (93) that part, as follows:

"Now, in the absence of any evidence to the contrary, that "record is sufficient proof in this case upon which you would be

"authorized to find that the property alleged in the indictment, was "stolen as alleged; in other words, it makes a *prima facie* case on "the part of the government which must stand as sufficient proof of "the fact until some evidence is introduced showing the contrary, "and there being no such evidence in this case, you will no doubt "have no trouble in coming to a conclusion that the property de- "scribed in the indictment was actually stolen, as alleged, from the "postoffice in Highmore."

State vs. Bulla, supra.
Durant vs. People, supra.

XII.

The presiding judge unwarrantably interfered with the verdict of the jury (97). To better comprehend the effect of this we ask the Court to in this respect consider the affidavits of the respective jurors. Under the evidence in the case the jury in their own way arrived at the conclusion that the defendant had in his posession stolen property but not for an improper purpose, and so expressed it in their first verdict.

1 Bish. New Cr. Law, Sec. 1006a.

It must be born in mind that the jury is composed of lay people not versed in the technicality of the law. There was nothing in the circumstances which could justify the judge in suggesting to the jury a verdict finding facts against the defendant different from the one upon which they had agreed, The effect of such suggestion when considered in connection with the charges of the Court combined with the fact that no copy of the indictment was given the jury is quite plain. It will be noticed that nowhere in the whole course of the procedure was the word "count" used in the presence of the jury until at this time. We think the jury were clearly misled by such procedure.

XIII.

The Court erred in refusing to consider the affidavits of the jurors (19).

2 Thompson on Trials, 2619 and cases cited.
Dalyrimple vs. Williams, 63 N. Y. 361.
Sawyer vs. ——, 5 Cow., 106.

XIV.

The tribunal before which the plaintiff in error was convicted was *coram non judice.* The act of Congress approved November 3, 1893, entitled "An Act to Provide for the Time and Place of Holding the Terms of the United States Circuit and District Courts in the State of South Dakota", divides the state into four subdivisions, and designated times and places within each of the subdivisions

where court shall be held. It provides that the term for the Southern division shall be held at Sioux Falls on the first Tuesday in April, and for the Northern division, at Aberdeen on the first Tuesday in May. After the first trial of the plaintiff in error upon the indictment in this case the Court then attempted to adjourn the term at Sioux Falls over the Aberdeen term until June, and at this latter time proceeded to try the case.

Van Fleet Collateral Attack, Sec. 32, and cases cited.
State vs. Roberts, 9 Nev. 44.
Wicks vs. Ludwig, 9 Cal., 173.
Norwood vs. Kenfield, 34 Cal., 329.

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